Supreme Court, U.S.
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No. 04-1527

In The Supreme Court of the United States

S.D. WARREN CO.,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

BRIEF FOR *AMICUS CURIAE* AUGUSTA, GEORGIA, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does the mere flow of water through an existing dam constitute a "discharge" under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The flow of water through a dam is not a "discharge" within the meaning of Section 401 of the Clean Water Act 3

II. If the Court affirms the judgment below, it should do so on the narrow ground stated by the Maine Supreme Judicial Court 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Catskill Mountains Chapter of Trout Unlimited, Inc.v. New York,
273 F.3d 481 (2d Cir. 2001) 7

City of Augusta, Georgia,
109 F.E.R.C. ¶ 61,210 (2004) 1, 8

Dubois v. United States Department of Agriculture,
102 F.3d 1273 (1st Cir. 1996) ..... iii, *passim*

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 4

IBP, Inc. v. Alvarez,
___ U.S. ___, No. 03-1238 (Nov. 8, 2005) 4

National Mining Association v. United States Army Corps of Engineers,
145 F.3d 1399 (D.C. Cir. 1998) 6

S.D. Warren Co. v. Board of Environmental Protection,
2005 ME 27, 868 A.2d 210 (2005) 7, 8, 9, 11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,009 11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,010 11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,011 10-11

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,012 10

S.D. Warren Co.,
105 F.E.R.C. ¶ 61,013 10

South Florida Water Management District v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004) ..... i, *et passim*

State of North Carolina v. FERC,
112 F.3d 1175 (D.C. Cir. 1997), *cert. denied*,
522 U.S. 1188 (1998) 5, 6, 7

Virginia Electric and Power Company,
77 F.E.R.C. ¶ 61138 (1996) 6-7

STATUTES

33 U.S.C. § 1362(12) 5, 6

33 U.S.C. § 1362(16) 5

Clean Water Act Section 401,
33 U.S.C. § 1341 ..... i, *et passim*

Clean Water Act Section 402, 33 U.S.C. § 1342 ..... 4, 5, 8

Clean Water Act Section 404, 33 U.S.C. § 1344 6

OTHER MATERIALS

58 Fed. Reg. 45008 (1993) 6

U.S. Environmental Protection Agency,
Office of General Counsel Opinion 78-8 5-6

INTEREST OF THE *AMICUS*

Augusta, Georgia (Augusta),[1] is the site of a pre-Civil War dam that recently has become the subject of a dispute under Section 401 of the Clean Water Act (CWA), the same federal law that is at issue in the case at bar. Spanning the Savannah River between Georgia and South Carolina, the Augusta Diversion Dam was built in the 1840's, as was the Augusta Canal, a channel that routes water from the River around the Dam and back into the River again. Augusta uses this long-established canal to furnish water to several mills which, in turn, use the water to generate hydroelectric power. Recent developments in the law place such furnishing of water under the purview of the Federal Energy Regulatory Commission (FERC) and, accordingly, Augusta has applied for a license from FERC (the Augusta Project).

Over the objections of Augusta, the FERC has ordered Augusta to obtain a Section 401 certification from South Carolina, under the theory that water flowing over the Dam constitutes a "discharge into the navigable waters" in South Carolina. *City of Augusta, Georgia*, 109 FERC ¶ 61,210 (2004) (cited in the petition for certiorari in this case). Inasmuch as the license has

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[1] Augusta, Georgia is the official name of the governmental entity created by the consolidation of the former City of Augusta and Richmond County, Georgia. No counsel for any party authored this brief, either in whole or in part; and no person or entity, other than Augusta, made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

not yet been issued, this FERC order is not yet final, and the decision in the case at bar may provide guidance on the ultimate resolution of the dispute concerning that order.

Augusta's arguments to the FERC are similar to those presented by petitioner, the S.D. Warren Company (Warren Company), in this case, and a decision in the Warren Company's favor almost certainly would require the FERC to reverse its order requiring Augusta to obtain a Section 401 certification from South Carolina. Due to factual distinctions between the Augusta Project and the project at issue in this case, however, affirmance of the Maine Supreme Judicial Court's decision would not necessarily control the disposition of Augusta's case. Augusta submits this brief to advocate reversal of the decision below. Alternatively, if the Court affirms that decision, Augusta urges the Court to do so on a narrow ground that observes the distinction between Augusta's case and this one.

SUMMARY OF ARGUMENT

Under this Court's *Miccosukee* decision, a flow of water from one place to another is not a "discharge," within the meaning of the CWA, unless the source and the destination are "meaningfully distinct water bodies." If the two locations are "hydrologically indistinguishable parts of a single water body," then the flow of water from one part to another is not an "addition" to the navigable waters and hence it is not a "discharge." The waters of a river or stream, above and below a dam, are not "meaningfully distinct."

They are "hydrologically indistinguishable." The flow of water over or through a dam therefore is not a CWA "discharge" and state certification under Section 401 is not required.

Alternatively, if the Court affirms the decision below it should do so on the narrow ground articulated by the Maine Supreme Judicial Court and by the First Circuit's *Dubois* decision -- that water which is removed from its natural course, subjected to private control (*e.g.*, passed through a snowmaking machine), and then returned to the river below constitutes a "discharge" to the waters below the point of diversion. This case does not present the same factual situation as Augusta's case, which involves a low-lying diversion structure which acts passively to allow water to flow downstream, impelled by gravity and not affected by any sort of control mechanism. This Court should not render a decision that predetermines the result of cases such as Augusta's, without allowing interested parties the opportunity to provide full briefing and argument on an adequate record that properly presents those questions for decision.

ARGUMENT

I. The flow of water through a dam is not a "discharge" within the meaning of Section 401 of the Clean Water Act.

This case tests the implications of *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). *Miccosukee* dealt with the question whether a discharge permit, under the National

Pollutant Discharge Elimination System (NPDES) created by Section 402 of the CWA, 33 U.S.C. § 1342, was required for a pumping facility in the Florida Everglades that transfers water from a canal into a wetland impoundment. The Court held that the dispositive question was whether the canal and the wetland are "meaningfully distinct water bodies" or "two hydrologically indistinguishable parts of a single water body," and it remanded for further development of that factual question. *Miccosukee*, 541 U.S. at 112, 109. If they are not meaningfully distinct water bodies, then there is no discharge into the navigable waters and the pump station will not need an NPDES permit. *Id.* at 112.

Application of the *Miccosukee* precedent to the Warren Company (or Augusta Project) FERC license proceedings should be simple and straightforward. The only legal distinction between *Miccosukee* and this case is that *Miccosukee* arose under Section 402 and this case arose under Section 401 of the same federal Act. The issue in both cases is the meaning of the statutory term "discharge"; and "the normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, ___ U.S. ___, No. 03-1238, slip op. at 11 (Nov. 8, 2005). *See also, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), and cases cited therein.

The only substantive difference between Sections 401 and 402 is that the former applies to "any activity ... which may result in a discharge," while the latter is limited to activities that result in a "discharge

of a pollutant." In *Miccosukee*, however, there was no dispute that the water transferred from the canal into the wetland contained a pollutant (phosphorous). *See Miccosukee*, 541 U.S. at 102-03. The only issue was whether the transfer of polluted water from the canal into the wetland was a "discharge" within the meaning of the CWA.[2] The Court held that the answer to that question turned on whether the canal and the wetland are "meaningfully distinct water bodies" or "two hydrologically indistinguishable parts of a single water body." *Id.* at 112, 109.

The CWA does not define the term "discharge" but describes it as "includ[ing] a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). It does define "discharge of a pollutant," as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12); *Miccosukee*, 541 U.S. at 102 (emphasis added). Thus "the word 'discharge' contemplates the addition ... of a substance or substances" to the "navigable waters"; and that is true under both Section 401 and Section 402. That is a specific holding of *State of North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1188 (1998).[3] *See also, e.g.*, U.S. Environmental

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[2] "The District does not dispute that phosphorous is a pollutant, or that [the canal] and [the wetland] are 'navigable waters' within the meaning of the Act. The question, it contends, is whether the operation of the S-9 pump constitutes the 'discharge of [a] pollutant' within the meaning of the Act."

[3] "Granted, the congressional instruction of 'discharge' in 33 U.S.C. § 1362(16) does not define discharge, but rather describes it as including 'discharge of a pollutant' which Congress has

(footnote continued ...)

Protection Agency, Office of General Counsel Opinion 78-8, at 2-4 (April 19, 1978)[4]; 58 Fed. Reg. 45008, 45011 (1993)[5]; *Virginia Electric and Power Company*, 77 FERC

(footnote continued:)

heretofore defined in § 1362(12) as 'meaning ... any *addition* of any pollutant ....' (emphasis added). It would seem to us apparent that since Congress meant 'discharge' to include 'discharge of a pollutant' then Congress intended the word 'discharge' to be defined in the inclusive use consistently with the included use. Therefore, if 'discharge of a pollutant' requires addition, then the inclusive understanding of 'discharge' also requires an addition." *North Carolina v. FERC*, 112 F.3d at 1187 n.4.

[4] "Section 401(a)(1) grants certification to the State 'in which the discharge originates or will originate.' Under Section 502(12) the discharge of the pollutant is defined as 'any addition of any pollutant to navigable waters from any point source.' Thus, there is no discharge until the pollutants enter navigable waters. For the purposes of Section 401, at least, the discharge thus originates at the point at which it enters the navigable waters."

[5] "EPA and the Corps agree ... that the presence of a 'discharge' into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404 [of the CWA, 33 U.S.C. § 1344, which applies only when there is a 'discharge of dredged or fill material into the navigable waters'] .... [T]his has been the agencies' long-standing position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement ...." *Cf. National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (invalidating the specific regulation announced in the cited Federal Register notice, on the ground "that the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back").

¶ 61138 (1996), *aff'd, North Carolina v. FERC*, 112 F.3d 1175 (D.C. Cir. 1997) ("We believe that Congress intended the word 'discharge' to include only substances that are added to the water in some manner ..."). Even the court below agreed, in this case, that "[a]n 'addition' is the fundamental characteristic of any discharge." *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, ¶ 11, 868 A.2d 210, 215 (2005). That legal conclusion is virtually compelled by the definitional language of the CWA, and to the best of our knowledge it has never been disputed or questioned by any credible authority.

In *Miccosukee*, the Court noted with approval the Miccosukee Tribe's concession "that if [the canal] and [the wetland impoundment] are *simply two parts of the same water body*, pumping water from one into the other cannot constitute an 'addition' of pollutants." 541 U.S. at 109 (emphasis added). Continuing, the Court quoted from *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001), as follows: "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" The dispositive question therefore was whether the canal and the wetland are "two pots of soup" or one. *Miccosukee*, 541 U.S. at 110.[6] That likewise is the dispositive question here.

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[6] *Cf. Catskill Mountains Chapter*, 273 F.3d at 493, discussing *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ("The court held that the transfer of polluted water from one water body [a river] to a distinct water body [a pond upstream of the river] constitutes an 'addition' of pollutants to the destination

(footnote continued ...)

The Maine Supreme Judicial Court apparently was unwilling to follow the logical implications of the *Miccosukee* decision, however.[7] It held instead that the operation of the Warren Company's dams "does result in an addition to the waters of the Presumpscot River" because the dams "remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." 2005 ME 27, ¶¶ 12, 13, 868 A.2d at 215, 216 (emphasis in

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(footnote continued:)

water body. The court emphasized that the two bodies of water, for all relevant purposes, were distinct: although water naturally flowed from the pond into the river, water would never naturally flow from river to pond. "*That difference made the pumping an 'addition'*") (emphasis added).

[7] The FERC was similarly unwilling to follow *Miccosukee* in its decision in Augusta's case. It stated that Augusta's argument "reads too much into *Miccosukee*," because "that case involved the necessity for obtaining an NPDES permit under CWA section 402, which is not the case here." *City of Augusta, Georgia*, 109 FERC ¶ 61,210 at P 11. It also reasoned that "[w]ater passing through the project impoundment may be changed in temperature or in chemical composition. Also, the act of flowing over the dam may alter certain characteristics of the water, such as its dissolved oxygen content." *Id.*, P 12 (footnote omitted).

That analysis misses the point. A discharge is an addition, whether under Section 402 or Section 401. If there were a discharge, a finding of changes in temperature or chemical composition might lead to a conclusion that there is a discharge of pollutants; but that does not address the question whether there is a discharge, which is the only appropriate question under Section 401. In *Miccosukee* the presence of pollutants in the water transferred from the canal to the wetland impoundment was acknowledged by all parties and by the Court; but that fact did not affect the critical question, in that case as in this one, whether there was a discharge at all.

original). "[W]ater that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway.... Therefore, water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of Section [401]." *Id.* at ¶ 17, 868 A.2d at 217.

The Maine Supreme Judicial Court erred. Application of its reasoning to the *Miccosukee* case would have led to a different result. *Miccosukee* turned on the hydrologic relationship between the canal and the wetland impoundment. As described in that decision, "a large pump station known as 'S-9'" pumps water out of the canal and into the wetland, sixty feet away. 541 U.S. at 100. The S-9 pump station undeniably subjects the water to "man-made control," in the words of the decision below in this case. "The District Court certainly was correct to characterize the flow through the S-9 pump station as a non-natural one, propelled as it is by diesel-fired motors against the pull of gravity." *Miccosukee*, 541 U.S. at 111. Under the Maine Supreme Judicial Court's reasoning, therefore, pumping the water from the canal into the wetland is a "discharge" as a matter of law. This Court did not see the matter that way, however. The dispositive issue to be addressed on the remand in *Miccosukee* had nothing to do with the pumping or "man-made control" of the water, but whether the canal and the wetland are "meaningfully distinct water bodies"; and if they are not, "then the S-9 pump station will not need an NPDES permit." *Id.* at 112.

The portions of a river above and below a dam which temporarily interrupts the river's flow are not "meaningfully distinct water bodies." *Id.* They are "two hydrologically indistinguishable parts of a single water body." *Id.* at 109. Water flowing over the dam therefore is not *added to* the "navigable waters" below the dam, and there is no "discharge *into* the navigable waters" below that dam. CWA § 401(a)(1) (emphasis added). The logic employed in *Miccosukee* compels the conclusion that Section 401 does not apply.

That is the case with the Augusta Diversion Dam. Water flows continuously downstream, over the dam, and it would continue to flow downstream if the dam were removed. There is no disputing the fact that the sections of the Savannah River above and below the dam are simply two parts of the same water body. Water flowing over the dam therefore is not added to the "navigable waters" below the Dam, there is no "discharge into the navigable waters," and Section 401 does not apply.

II. If the Court affirms the judgment below, it should do so on the narrow ground stated by the Maine Supreme Judicial Court

The Warren Company's hydroelectric dams, at issue in this case, include intake structures, powerhouses, and river bypasses that convey water from the project dams to the downstream end of their tailrace channels. *See S.D. Warren Co.*, 105 FERC ¶ 61,013 at P 10 (2003) (Saccarappa Project); *S.D. Warren Co.*, 105 FERC ¶ 61,012 at P 13 (2003) (Little Falls Project); *S.D. Warren Co.*, 105 FERC ¶ 61,011 at

P 14 (2003) (Mallison Falls Project); *S.D. Warren Co.*, 105 FERC ¶ 61,010 at P 13 (2003) (Gambo Project); *S.D. Warren Co.*, 105 FERC ¶ 61,009 at P 13 (2003) (Dundee Project).

As discussed above, the Maine Supreme Judicial Court held that the operations of those dams result in an addition to the waters of the Presumpscot River on the ground that "water that has left its natural state and has been subjected to man-made control constitutes an 'addition' upon its return to the same navigable waterway.... Therefore, water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of Section [401]." 2005 ME 27, ¶ 17, 868 A.2d at 217. It relied in part on *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273, 1297 (1st Cir. 1996), which held that water passing through snowmaking pipes "leaves the domain of nature and is subject to private control rather than purely natural processes. As such, it has lost its status as waters of the United States."

That reasoning does not apply to Augusta's case. The Augusta Diversion Dam has no intake or powerhouse. It has no gates, flashboards, spillway or valves which release water into the River, and no operator triggers any such releases. It is a low-lying diversion structure with no significant impoundment, little more than a weir. It acts passively to allow water to flow downstream, impelled by gravity and not affected by any sort of control mechanism. Augusta's case thus does not present the question of application of Section 401 to a facility in which water is diverted

through a powerhouse and bypasses some portion of the stream.

The Augusta Canal headgates are located adjacent to the Augusta Diversion Dam and control the flow of water through the canal, which parallels an approximately seven-mile reach of the Savannah River. The reasoning of the *Dubois* decision and the decision below therefore might be applied to the water flowing from the Augusta Canal through the mill powerhouses, but not to the water that flows over the Augusta Diversion Dam. No part of the Augusta Canal is located in South Carolina. Application of the reasoning employed by *Dubois* and the Maine Supreme Judicial Court therefore would require Augusta to obtain a Section 401 certification from Georgia but not from South Carolina, contrary to the FERC's decision in its case.

If the Court determines to affirm the decision below, Augusta urges it to do so on the narrow ground stated in *Dubois* and the decision below. We respectfully submit that the Court should not announce a broadly worded decision that would lead the FERC and the lower courts to conclude that *all* water that flows over or through a dam *necessarily* constitutes a "discharge" within the meaning of the CWA. Questions arising from cases such as Augusta's are not presented in this case, and therefore the Court should be careful not to predetermine the result of such cases without allowing interested parties the opportunity to provide full briefing and argument, on an adequate record that properly presents those questions for decision.

CONCLUSION

For the foregoing reasons, the decision of the Maine Supreme Judicial Court should be reversed or, in the alternative, affirmed on the narrow grounds stated in that decision.

Respectfully submitted,

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